No. 4355

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES FORNI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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FILED

Neal, Stratford & Kerr, S. F. 44360

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STATEMENT.

Charles Forni, the plaintiff in error, prosecutes a writ of error to the District Court of the Northern District of California to reverse a judgment and sentence of conviction rendered by that court against him on April 10, 1924.

On March 20, 1923, an information in two counts was presented in the said court against plaintiff in error and one George Blake. In the first count of the information it was charged, in the usual phraseology, that on December 26, 1922, at 2933 Webster Street in said City and County they maintained a common nuisance and a large quantity of intoxicat-

ing liquors was set forth as being kept for sale on the premises. In the second count the same parties were charged with the unlawful possession of intoxicating liquor. Both defendants had been arrested and both interposed pleas of "not guilty". The information is set forth at Trans. pp. 3 to 8.

Certain matters appearing on pages 9 to 31 inclusive constitute no part of the record, but it is believed the greater portion thereof has been set forth in the bill of exceptions beginning at page 32.

On March 13, 1923, the defendant Forni interposed his verified petition for a return of personal property, referring therein to a large quantity of various kinds of intoxicating liquor, a list of which appears at Trans. p. 34. There is printed an affidavit in support thereof, but perhaps erroneously, because not verified nor filed until the following July, which was after the motion had been determined. The motion does not pray for any other relief than a return of the liquors. In response to the petition the respondents on March 21, 1923, interposed an answer and with it the affidavit of one D. W. Rinckel in opposition to the petition. (Trans. pp 43 to 47.)

In the affidavit the officer deposed that at times material he was a Federal Prohibition Agent acting under the authority of the Federal Prohibition Director:

> "That there was a building located at number 2933 Webster Street, in said City and County of San Francisco; that underneath the said

> building there is a garage which is disconnected from any other portion of the building in that there is no ingress or egress therefrom to any other portion of the building, and that the main entrance into said garage is on and from said Webster St.,"

and further he deposed that prior to December 26, 1922, he and other Prohibition Agents

> "had reliable information that intoxicating liquor, to wit, whiskey, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes was stored, sold and delivered from the garage hereinabove mentioned,"

and he further deposed that pursuant to said information on December 26, 1922, he and another Prohibition Agent

> "went to the said premises and affiant, looking through an open door saw in plain sight in said garage about 25 cases of intoxicating liquor, to wit, Scotch whiskey, containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes, which said intoxicating liquor in said garage was in cases, and which said cases were marked 'D. T. Co. Vancouver, B. C.,' the said 25 cases each contained 12 bottles; that the said intoxicating liquor was untax-paid and contained no Internal Revenue stamps whatever; that in the rear of said premises in a shed, affiant then and there saw through an open door,"

then describing a large quantity of intoxicating

liquors, including a hydrometer and a glass gauge tube. (Tr. p. 58.) Affiant further declared that on said day he secured a search warrant based upon the above facts and entered the garage and seized the liquor therein and entered the shed and seized the liquors therein; that all the barrels, including those containing liquors as well as empty barrels, were marked "Vancouver, B. C." Affiant further stated that neither he nor any of the other agents present at any time entered the dwelling of said defendant; that while he saw liquor in the residence he did not, nor did any other Agent search for, seize or attempt to seize any of the intoxicating liquor in the said residence of the said defendant. (Tr. pp. 59, 60.) The further statement was made

> "That at the time of the search and seizure under the said search warrant affiant then and there arrested one of the defendants herein, to wit, George Blake, for a violation of the said National Prohibition Act, and the said George Blake then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That thereafter on said 26th day of December, 1922, approximately one-half hour after the above said arrest, the defendant, Charles Forni, came to said premises and affiant then and there arrested the said defendant for a violation of the said National Prohibition Act, and the said Charles Forni then and there stated to affiant that he was the owner of the said intoxicating liquor so seized. That at all times herein mentioned said liquor was illicit and contraband." (Tr. p. 60.)

The petition was heard, as far as the record shows, on March 22, 1923, the court considering the verified petition, the affidavit of Officer Rinckel and also the search warrant and affidavit therefor made by the same officer referred to in his affidavit. The search warrant appears at Trans. p. 47, and the affidavit forming the basis thereof on p. 49. In the affidavit the same officer deposes that he had reason to believe, and did believe,

> "That within a certain house, store, building or other place, in the Northern District of California, to wit:
>
> A certain basement garage at No. 2933 Webster Street, San Francisco, California, and an outhouse or shed on same lot in the rear, being the premises of parties unknown, there is located certain property, to wit, illicit liquors which is being used as the means of committing a felony, to wit, a violation of the National Prohibition Act of the statutes of the United States";

and he further stated that the facts tending to establish the grounds of the application and probable cause for believing such facts exist were as follows:

> "That this affiant on the 26th day of December, 1922, visited said premises and saw quantities of liquors, without evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of one-half

> per cent alcohol illegally acquired, are stored and traded in from this garage." (Tr. p. 62.)

The court denied the petition.

The case came on for trial on April 10, 1924. Three days prior thereto the defendant Forni interposed his verified petition praying for an order prohibiting the United States of America "from introducing the said personal property in evidence at the trial of the said action," referring to the same liquors. The allegations of the petition last filed were not substantially different from the first petition, but there had been filed in the meantime the affidavit of petitioner appearing at Trans. p. 37, but this was not substantially dissimilar from the new affidavit filed April 7, 1924, appearing at Trans. pp. 54 and 55. The affidavit declared in substance that affiant and his brother resided on the premises for about three years prior thereto and occupied the entire premises as a private dwelling house and described the premises as a two-story frame building and basement thereof, and an outhouse or shed about 30 feet from the rear of the building, the building and shed being within the common enclosure, but the affidavit further stating

> "That the said basement and said shed from time to time during said period and in particular on the said 26th day of December, 1922, was used by affiant and his said brother for the purpose of therein storing in addition to said property seized as aforesaid, their personal effects

such as furniture, clothes, pictures and the automobile of affiant";

and it was said that Rinckel gained access to the shed by scaling the wall surrounding the same.

In answer to the last petition the government made the same showing as it made in response to the first. The search warrant and affidavit in support thereof being also before the court and considered, the court denied the petition. (Trans. p. 64.)

At the commencement of the trial it was developed that the defendant Blake was not present. A continuance was requested on his behalf and refused by the court and the trial proceeded with. Thereupon the government called a single witness, D. W. Rinckel, whose testimony appears at Trans. pp. 65 to 70. Omitting rulings as to evidence, the testimony of the witness was as follows:

"I am and for 4 years prior to this date have been a prohibition officer. I have known Charles Forney, also known as 'Slim Forney,' as long as I have been on the prohibition force. I have arrested him several times."

"Q. About how many times, Mr. Rinckel?" (Tr. p. 65.)

"A. I arrested him 4 or 5 times. I had occasion to go to No. 2933 Webster Street, San Francisco, on December 26, 1922."

"Q. Why did you go there, Mr. Rinckel?

A. I got reports there was a large amount of liquor."

"I went there with Agent Corey, the driver and another agent. The place is a residence house, with a garage underneath, and sheds in the back."

"Q. Did you observe anything when you went there on the 26th day of December, 1922?

A. Yes, sir." (Tr. p. 66.)

"A. We were watching that place to get a delivery of liquor coming out of there; and a truck came out of there, and the agents searched the truck, and there was nothing on it, and to make sure that this informant was right, we went up there and made an investigation, and found this liquor in the back sheds. We first observed that from another lot, the liquor in the back shed, and climbed into the yard and saw into the basement and saw the liquor piled up there, and went to the United States Commissioner and got a search warrant, and went back and seized the liquor."

"Q. The liquor seized, Mr. Rinckel, consisted of 25 cases of Scotch whiskey? A. Yes, sir.

Q. Two 50-gallon barrels of whiskey?

A. Yes, sir.

Q. One 50-gallon barrel of whiskey?

A. Yes, sir.

Q. One 50-gallon barrel part full of Sherry wine?

A. Yes, sir." (Tr. p. 67.)

"I found there two 175-gallon puncheons of red wine, one 10-gallon barrel of alcohol; a 5-

gallon can of alcohol; two 50-gallon barrels of brandy; jugs of red wine, 93 quart bottles of red wine; 2 gallon jugs of white wine; a hydrometer and a glass tube. The defendant Forney was not present at the time but came in later. Blake was present. I talked with Blake first and when Forney came in I talked with him. Blake claimed the liquor until Forney came in and then Forney stated that it was his. I am familiar with various kinds of intoxicating liquors."

"Q. And did you observe the general color, appearance and qualities of this liquor, set forth in the information in this case?

A. It was intoxicating liquor." (Tr. p. 68.)

"Do you say from your experience as a prohibition officer that all of this liquor contained over one-half of one per cent of alcohol by volume? A. Yes, sir."

"I placed Forney under arrest and subsequently filed an information."

(Cross Ex.)

"This is a dwelling house with a garage underneath and with outhouses, which were all enclosed with fences. I climbed over the fence and I could see into the basement and see the wine barrels and bottles there, which were in the shed from the adjoining yard and I climbed over the fence and could see into the basement. I saw no liquor being sold there. It was reported to our office that they were taking liquor in and out of there all of the time. The report came from a neighbor next door. (Tr. p. 69.)

"Q. (By the Court). You have made arrests of this man for violation of the prohibition law before?

A. Yes, sir, for bootlegging. He has what is known as 'Slim's Fly Trap Restaurant' there. As to where the liquor came from, I have only Forney's statement. He said he purchased Scotch whiskey from a boat which was lying outside. He bought the liquor 'over the rail' outside; I mean by 'over the rail' outside from a boat which was lying outside, that is the Scotch whiskey had been purchased over the rail from outside." (Tr. p. 70.)

The case against both defendants was submitted to the jury in a charge given by the court on his own motion and both defendants were convicted on both counts. (Trans. pp. 76 and 77.) The charge of the court given orally appears at Trans. pp. 73 and 74; at the close the court asked "are there any objections to the instructions?" (Trans. p. 74.) No objection nor exception was then interposed, except that the defendant Forni excepted to the failure of the court to give two instructions theretofore requested by him, the first being

"If the premises in question were used and occupied by defendant as a private dwelling, to justify a verdict of guilty, you must find from the evidence, either that it was being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose."

and the second being,

"The term private dwelling includes the entire frame building in which the dweller resides

as well as all buildings and outhouses situated within the common enclosure provided that the same are used solely for the comfort and convenience of the dweller and are not used for any business."

Thereupon the defendant Forni was sentenced to be imprisoned for a period of one year in the County Jail of San Francisco and to pay a fine of $500 on the first count, and that he pay a fine of $500 on the second count. There was no motion interposed at any time on behalf of either defendant for a directed verdict.

POINTS INVOLVED

There are ten assignments of error, to wit:

1) The ruling on the first petition.
2) The ruling on the second petition.
3) The ruling on the respect of testimony as to the amount and character of certain intoxicating liquors.
4) The overruling of the objection to the question "about how many times, Mr. Rinckel?"
5) The overruling of the objection to the question "Why did you go there, Mr. Rinckel?"
6) The overruling of the objection to the question "Did you observe anything when you went there on the 26th of December, 1922?"
7) The ruling permitting witness Rinckel to testify as to his conclusions concerning

liquor seized, he not qualifying as to witness on the subject.

8) Ruling in refusing to permit defendant to produce testimony as to the character of the premises on Webster Street, in that he offered to prove that the premises were his dwelling place.

9) The refusal of the first instruction proposed by the defendant.

10) The refusal of the second instruction proposed by the defendant.

But the substantial proposition here argued is, that certain testimony received by the court was incompetent to be received in the face of objections said to be interposed.

ARGUMENT

I

THE COURT DID NOT ERR IN THE RECEIPT OF ANY INCOMPETENT TESTIMONY RELATING TO INTOXICATING LIQUORS.

(1) THE RECORD DOES NOT SHOW ERROR.

It will profit here to make certain distinctions and to show what this case is not. There is no question here as to the sufficiency of the evidence to show guilt. There was no motion made at the trial by either defendant for a directed verdict on either count; neither is there any assignment of errors designed to raise the question of the sufficiency of the evidence.

Nor can there be any contention but that the evidence of the witness Rinckel heretofore quoted was entirely *relevant* to be considered in the case as tending to prove the charges set forth in the information. The witness directly deposed to facts showing that the defendants at the premises at No. 2933 Webster Street, San Francisco, had stored in a garage and an outbuilding a large amount of intoxicating liquors aggregating 25 cases or 300 bottles of Scotch whiskey, 254 gallons of other whiskey contained in six barrels, a 50-gallon barrel of sherry, 900 gallons of red wine, 350 gallons of red wine in two puncheons, 15 gallons of alcohol, 100 gallons of grape brandy in two barrels, 55 gallons of wine in jugs, 93 quart bottles of red wine and a 2-gallon jug of white wine, and it was not without significance that there was shown to be *15 empty* barrels, also a hydrometer and glass tube. The liquors so described would be valued at a very large sum. This liquor was, as the defendants themselves put it, "stored" in the garage and in the shed. It was shown further that the defendant Forni, speaking of the Scotch whiskey, said he bought it "over the rail" from a boat lying "outside". While at the time of the seizure defendant Blake, who was present and was arrested, claimed the liquor, the defendant Forni came later and also claimed it. There was the further fact that while the agents watched before going up to observe the premises they saw a truck come out and searching it found nothing on it. While these liquors were not put in evidence,

the Agent Rinckel testified as to the facts in regard to the defendant's possession of the same.

The evidence was relevant.

But the contention is that evidence concerning the liquors in question was *incompetent,* and that it should not have been received because its receipt was in violation of defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. The evidence was *apparently* competent and the burden was on the defendant to show preliminarily on *voir dire* such outside facts as would serve to show the incompetency of the evidence. Such a showing is claimed to have been made and the defendant's contention in that behalf presents the substantial question for consideration by the court. To meet the rule that such a collateral issue cannot ordinarily be raised at the trial, the defendant Forni made certain antecedent motions. Some months before the trial he moved for a *return* of the liquors, supporting the motion by his verified petition and putting in evidence also certain search warrant proceedings instituted at the time of the seizure of the liquor. His contention was met by the affidavit of the witness Rinckel. Upon consideration, the motion was denied. It will be noted that defendant did not move *for the exclusion from evidence* of either the liquors or of any information obtained by the agents upon any search. But the mere withholding of the liquors from the defendant standing alone could have had no effect upon the

event of the trial. Apparently appreciating such a point, the defendant moved at the opening of the trial "that an order be made prohibiting the United States of America from introducing said *personal property* in evidence at the trial of said action". He did not move for the exclusion of any *information* obtained by the agents. Upon substantially the same showing the court denied the motion.

But at the trial the government did not offer any of the said personal property in evidence. The evidence of the agent in describing what he saw was deemed by the government sufficient to convince the jury of the defendant's guilt and it did not find it necessary to make use of the demonstrative type of evidence frequently made use of when liquors are put in evidence and exhibited to the jury. Thus the court's denial of the precise thing asked on the motion—and it will not be presumed that its denial went any further—cannot be held to have affected in any manner the subsequent trial proceedings.

It is undoubted that the principle now contended for, if the contention were well founded in fact, would also have served to exclude from evidence statements by the agent of what he saw and found upon an examination of the premises in making the questioned search. But turning to the record of the testimony of the witness Rinckel it is seen that objection to the testimony as to such statements was not made until the government had substantially proven its case. There was nothing in any ante-

cedent objection that would have required the court to anticipate and exclude the evidence on its own motion. Thus, as will be seen from the record (Tr. p. 67) the witness Rinckel was permitted without objection to testify at length as to incriminatory matters observed by him on his visit to the premises. He said without objection that he and the Agent Cory and two others were watching the place to get a delivery of liquor coming out of there; that a truck came out, was searched by the parties, nothing was found on it, thereupon the agents went up, made an investigation and found this liquor in the back shed. *They first observed that from another lot,* the liquor in the back shed; they climbed into the yard and saw into the basement and saw the liquor piled up there, immediately got a search warrant and returned and seized the liquor. And the witness, still without objection, was allowed to describe the liquor so seized as 25 cases of Scotch, three 50-gallon barrels of whiskey, and a 50-gallon barrel of wine. Thereupon, for the first time an objection to the testimony was interposed, although the precise question asked *had just been answered.* (Tr. p. 67.) The witness testified further, also without objection, as to finding further liquors; that Blake was present and claimed the liquors until Forni came and that he then claimed the liquors, and the witness further stated that Forni told him that he had purchased the Scotch whiskey from a boat "lying ouside". The latter testimony was without objection.

It thus results that it appears from a close con-

sideration of the record that the defendant was not denied anything that he asked that could have influenced the verdict. He merely asked that the liquors be excluded from the evidence and they were not in fact put in evidence. He did not object to the testimony of Rinckel in his description of the surroundings, or of the premises, or as to the liquors until practically the whole case was proven by the government. The case thus follows within the principle that a trial court should not be reversed as for error in rulings that it did not make.

The necessity of specific objections at the time the evidence was received is made more manifest when we consider that as to much of the testimony of Rinckel, such as that of the statements of Forni, statements of what Rinckel observed from the adjoining lot, or what he saw through the open door of the garage would not be a disclosure of any knowledge that he obtained when making the search. Accordingly, the objection should have been specifically made.

(2) THE TESTIMONY WAS IN FACT COMPETENT.

But a further consideration of the testimony will show that the defendant did not establish the *incompetency* of the evidence as to his possession of the liquors even if he had properly and seasonably objected. On this issue it is proper to consider all the preliminary facts, as well as everything else shown to the court up to the time of the receipt of the evi-

dence. We are thus entitled to consider the affidavit of Rinckel produced at the hearing of the preliminary motions, his affidavit filed for the purpose of obtaining the search warrant and his preliminary testimony at the trial on the issue, as well as any showing made by defendant and from such a showing it appears that

a) the liquors were properly seized upon a search warrant,

b) they were properly seized as an incident to the lawful arrest of the defendant Blake at least, even if the search warrant had not been validly obtained.

(a) THE SEARCH WARRANT OBTAINED BY AGENT RINCKEL WAS NOT INVALID.

The witness Rinckel, as a portion of his testimony, stated that on account of information from neighbors he was led to watch the garage and seeing a truck come from it, which, upon being searched, disclosed nothing, he went up to the premises and, looking *through an open door,* saw cases of Scotch whiskey marked as coming from abroad and without any evidence on the packages of a tax being paid. He immediately departed and the same day obtained the search warrant in question. It is true he did not put in the affidavit for a search warrant all the facts he saw and could have put in the affidavit. But, on the other hand, the affidavit is not subject to the infirmity sometimes found, to wit, that it con-

tained no more than the statement of the agent that he "had reason to believe and did believe", etc. For the affidavit for search warrant did state one definite incriminatory fact, to wit, that on the same day the agent visited the premises and saw a quantity of liquors without evidence of tax being paid. The further statement that affiant had been informed that liquors are taken to and from the garage night and day, while standing alone might not have been sufficient, yet being coupled with the statement that affiant visited the premises and saw a quantity of liquors, it would not be without significance. It thus appears that the United States Commissioner had before him an affidavit of a definite fact tending to show probable cause for the issuance of the warrant. The property was sufficiently described as a basement garage at No. 2933 Webster Street, San Francisco, and an outhouse or shed on the same lot in the rear, being the premises of parties unknown.

Tynan vs. U. S., 197 Fed. 177, 179.

Since the affidavit in question contains a definite incriminatory fact tending to show probable cause it may not be said to be subject to the infirmities of the affidavits under consideration in the cases cited by counsel.

Since in the fourth amendment to the constitution, a search or seizure of property is referred to in the same terms as a seizure of person, it follows that decisions relating to probable cause upon which to base a warrant of arrest will be of service in deter-

mining what is probable cause upon the issuance of a search warrant. The following cases are pertinent:

U. S. vs. Burr, 24 Fed. Cas. No. 14692a.

In that case Chief Justice Marshall having occasion to state the rule said:

> "On an application of this kind I certainly should not require that proof which would be necessary to convict the person to be committed on a trial in chief; nor should I even require that which would absolutely convince my own mind of the guilt of the accused; but I ought to require and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reasons to believe that the crime alleged has been committed by the persons charged with having committed it."

In

Munns v. Dupont, Fed. Cas. No. 9926, 3 Washington C. C. 31,

it was said:

> "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."

Other cases holding that the words "probable cause" used as a measure of proof required in proceedings do not import that the evidence should be

sufficient to justify conviction at trial, are the following:

Bingham v. Bradley, 241 U. S. 511;
Bryant v. U. S., 167 U. S. 104;
Sternaman v. Peck, 80 Fed. 883.

The garage was not occupied as a private dwelling.

It is further contended that the premises in question were a "private dwelling" and that a warrant could not be issued to search it unless there was evidence of a sale of liquor. If the initial showing before the Commissioner had disclosed that the premises were a "private dwelling", it may be true that the affidavit should then go further and show that the case was within one of the exceptions set forth in Section 25 of Title II of the National Prohibition Act. But since it does not appear from the affidavit that the premises were a private dwelling and since there is nothing in the general search warrant act contained in Title XI of the Espionage Act, which required a showing upon that point, we think it must be entirely clear that the proceedings are sustainable unless controverted under the provisions of section 15 of the Search Warrant Act, (40 Stat. 229, Barnes Fed. Code, sec. 10061). If so controverted the issue can then be tried as to whether the building be a private dwelling or whether it be within one of the exceptions set forth in Section 25. The subsequent preliminary motions adverted to may constitute such a proceeding. If that be true, the showing of the government upon the point in question

was sufficient to sustain the warrant. For the court was not obliged to accept the evidence of defendant Forni, certainly not where controverted, and as clearly not where the court, from the surroundings, may consider it as palpably untrue. While Forni did testify that the premises were used solely as his private dwelling, and that the premises were not used for the sale of liquor, and that the garage was a part of the dwelling, on the other hand Rinckel testified that the garage was disconnected from any other portion of the building in that there is no ingress or egress therefrom to any other portion of the building and that the main entrance into the said garage is on and from said Webster Street (Tr. p. 57), and again that affiant did not, nor did any of the other Prohibition Agents present, at any time enter the dwelling of said defendant, and that while affiant saw liquor in the residence of the defendant he did not, nor did any other agents search for, seize, or attempt to seize any liquor in the residence of the defendant.

There was evidence for the court to find a sale of liquor in fact.

Moreover, if the garage were held to be a portion of the private dwelling of the defendant the case was shown to be in at least one, if not two, of the exceptions stated in Section 25. It must not be overlooked that the unusually large amount of liquors stored on the premises is to be accorded great significance in determining the issue, as well as state-

ments made by Forni in regard to the liquors. The court could thus have found that he had in his possession the large quantity of liquor described, bearing marks showing that it had been imported and without marks showing that it had passed through the customs, or had paid any tax. There was further the express admission of Forni that he had purchased it "over the rail outside", thus expressly admitting that it was contraband; there appeared the further significant fact that as to fifteen of the barrels they had been emptied. The court was thus authorized to infer that in fact a sale had been made of liquors from the premises. The statute itself, Section 33 of Title II of the National Prohibition Act, provides that *possession* of such liquors, under the circumstances here shown is prima facie evidence that the liquors are kept *for the purpose of being sold.* It is therefore manifest that in consideration of this presumption, of the circumstances of the unlawful importation, and of the fact that fifteen of the barrels were empty, would authorize the court to infer that there had been *in fact* a sale.

The court could have found that the garage was used for a business purpose—a store.

Moreover, the trial court would have been compelled to find that the premises were used for a business purpose "such as a *store*". It is indeed not without great significance that defendant Forni, in describing the surroundings, was compelled to make use of the very word *store* in his affidavit, for he

deposes in his affidavit (Tr. p. 55) that the said basement and shed were used by affiant and his brother "for the purpose of therein *storing* in addition to said *property seized* as aforesaid, (the said liquors) personal effects, etc". And counsel at the trial in framing his questions, and no doubt familiar with the case in hand, was constrained perforce to drop into the same phraseology when he asked one of his own witnesses (Tr. p. 71) "do you know what was *stored* in the basement in *addition* to *this liquor* taken from there?" Again considering the wholesale store of liquors under the circumstances adverted to, it is clear that the court had the discretion to find that the basement in question, if not used for the actual sale of liquor was used for a business purpose, to wit, a store for liquor.

(b) THE SEIZURE OF THE LIQUORS IN QUESTION WAS PROPERLY MADE AS AN INCIDENT TO A LAWFUL ARREST.

If it should turn out that the search warrant in the possession of Agent Rinckel was not validly issued, it would still have been legal and proper for him to seize the liquors as an incident to a lawful arrest.

Vachina vs. U. S., 283 Fed. 35.

Prior to obtaining or using any search warrant Prohibition Agent Rinckel, looking through an open door, saw in plain sight in the garage 25 cases of intoxicating liquor, to wit, Scotch whiskey. The cases were marked "D. T. Co., Vancouver, B. C.," was

untax paid, and contained no revenue stamps whatever. Rinckel so deposes in his affidavit (Tr. p. 58). As to the liquor in the back sheds, Rinckel deposes (Tr. p. 67) that they first observed that from another lot. Thus, the officer had personal knowledge from his senses that a considerable quantity of intoxicating liquor, to wit, Scotch whiskey, which bore indications of being illicit and contraband, were stored in the garage and manifestly unlawfully possessed by some person. A short time later in the same day the same officer seized the liquor and arrested Blake, who was present and claimed to own the liquor. (Tr. p. 60.) There was thus a misdemeanor being committed in the presence of the officers, whereupon they immediately arrested the person apparently committing the crime, who claimed to own the liquor, and seized the liquors as an incident to such arrest. The authorities are uniform that in such case a warrant was not required.

We cite the following cases holding and applying the principle.

This Court in the case of

Vachina vs. U. S., 283 Fed. 35, 36,

said:

> "The Fourth Amendment to the Constitution, which prohibits unreasonable searches and seizures, is to be construed in conformity with the principles of the common law. At common law officers may arrest those who commit crimes in

their presence, and they may avert a crime in the process of commission in their presence, by arrest, and without a search warrant they may seize the instrument of the crime. Bishop, New Crim. Proc. Sec. 183; Byrne, Federal Crim. Proc. Sec. 10. The question which is here presented was before this court in *Kathriner v. United States,* 276 Fed. 808, which we held under circumstances almost identical with those here disclosed, that liquor may be seized without a search warrant. Other similar rulings are found in *United States v. Borkowski* (D. C.), 268 Fed. 408; *United States v. Camarota* (D. C.), 278 Fed. 388; *In re Mobile* (D. C.), 278 Fed. 949; *United States v. Snyder* (D. C.), 278 Fed. 650."

Thus in

Lambert v. U. S., 282 Fed. 413, 417,

it was said by this Court:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means

> of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

Another instructive case on the point of a seizure of articles as incident to a lawful arrest was the case of

Agnello vs. U. S., 290 Fed. 671, 679.

In that case the Circuit of Appeals for the Second Circuit, on a review of the authorities, upholds the right of search and seizure in such case. There was an arrest of certain parties for a violation of the Narcotic Laws and besides the search of the person the officers went some distance away and searched the lodgings of one of them.

In the case of

Dillon vs. U. S., 279 Fed. 639, 647,

the Circuit Court of Appeals of the Second Circuit applied the same principle and quoted with approval from the case, *ex parte*

Morrill, 35 Fed. 261, 267,

as follows:

> "In other words, a crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause, too, to believe, or seasonable

> ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime."

And referring to a case previously decided in the same court said:

> "And in *Wiggins v. United States,* 272 Fed. 41, 45, we stated our belief that, where liquors were being sold in violation of law, the officers, who witness the commission of the offense, have as much right to seize the liquors without a search warrant as they have to apprehend the wrongdoer without a warrant of arrest. We see no violation of any constitutional right of the defendant in taking possession of the liquors, which the defendant had in his unlawful possession and of which an unlawful use was being made in the presence of the officers."

In the case of

McBride vs. U. S., 284 Fed. 416, 419,

the Circuit Court of Appeals of the Fifth Circuit applied the same principle and said:

> At common law it was always lawful to arrest a person without warrant, where a crime was being committed in the presence of an officer and to enter a building without warrant, in which such crime was being perpetrated.
>
> *Wharton, Criminal Procedure* (10th Ed.), Secs. 34, 51; *Delafoile v. New Jersey,* 54 N. J. Law, 381 24 Atl. 557, 16 L. R. A. 500, 502; *In re Acker* (C. C.) 66 Fed. 290, 293.

"Where an officer is being apprised by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without warrant. *Piedmont Hotel v. Henderson,* 9 Ga. App. 672, 681, 72, S. E. 51; *Earl v. State,* 124, Ga. 28, 29, 52 S. E. 78; *Brooks v. State,* 114 Ga. 6, 8-39, S. E. 877; *Ramsey vs. State,* 92 Ga. 53, 63, 17 S. E. 613. Therefore we are of the opinion that the entry into this stable under the circumstances of this case was legal, and that the court did not err in admitting the testimony of the officers."

The evidence of the commission of crime in the McBride case was derived principally or wholly through the sense of smell.

The case of

U. S. vs. Borkowski, 268 Fed. 408, 412,

was a case of the same character wherein the officers through the sense of smell came to know that a crime was being committed. The District Court in that case said:

"The rule, state and federal, is that officers may arrest those who break the peace or commit crimes in their presence. Bishop's new Crim. Proc., Sec. 183; Byrne, Fed. Crim. Proc., Sec. 10; *Wolf v. State,* 19 Ohio St. 248. Byrne states that officers may avert a criminal act in the process of commission before them, either by arresting the doer or seizing and restraining the instrument of the crime. See also *Ross v. Lettett,* 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ex parte Morrill* (C. C.), 35 Fed. 261;

Bad Elk v. U. S., 177 U. S. 530, 20 Sup. Ct. 729, 44 L. Ed. 874, and *Kurtz v. Moffit,* 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

Other pertinent cases turning upon the principle that an officer may make an arrest for a crime committed in his presence without a warrant and as incident to such lawful arrest, may make a further search of the person and surroundings of the party arrested, are the following:

U. S. vs. Daisin, 288 Fed. 201;

Kathriner vs. U. S., 276 Fed. 808;

O'Connor vs. U. S., 281 Fed. 396;

Green vs. U. S., 289 Fed. 236;

U. S. ex rel Flynn vs. Fuellhart, 106 Fed. 911.

There was thus abundant evidence to show that the officers came to know that a crime was being

committed in their presence and the discretion of the court in so deciding will not now be disturbed.

This court in its opinion in

Winkler vs. U. S., 297 Fed. 202, 203,

cited with approval certain language from the case of

Snyder vs. U. S., 285 Fed. 1,

to wit:

> "Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge and his finding should not be disturbed on appeal unless it is without support in the evidence."

In the instant case the court sustained the view that the officers had probable cause for knowing that a crime was being committed.

The decision of this court in the case of

Temperani vs. U. S., 299 Fed. 365,

is cited as an authority against the position of the government here taken. In fact no other arguments are urged as against the government's contention that the liquor here could have been seized as incident to a lawful arrest. But the distinction between the facts of the Temperani case and the facts of the case at bar is clear.

Thus in the Temperani case (p. 367) it was stated that the government did not claim the right to search a private dwelling or garage "under the facts

disclosed by this record, but an attempt is made to justify the conduct of the officers under the common law or statutory rule permitting peace officers to make arrests for offenses committed within their presence". It thus appears that the court did not intend to dispute such a rule, but it was said the case was not within the rule, for the opinion continued, "But there the offender was not in the presence of the officers; he was not in the garage and they had no reason to suspect that he was there. Laying all pretense aside the officers entered the garage not to apprehend an offender for committing an offense within their presence, but to make a search of the premises to obtain tangible evidence to go before a jury". It is further stated in the opinion that at the time of the entry in the Temperani case there was no person in the garage and the plaintiff in error was absent from home. On the other hand, in the instant case the officers at the time they seized the liquors arrested Blake, who claimed to own the liquors. (Tr. p. 60.) It therefore appears that in the instant case there was at the time of the seizure a lawful arrest of defendant Blake for the crime of the unlawful possession of the intoxicating liquors. The circumstance that Forni was not arrested until some minutes later does not alter the case.

There can be noted the further distinction between the Temperani case and the case at bar in this, that the court in the instant case had sufficient facts before it to conclude that the garage in question was

not a part of the dwelling, but that the contention in that behalf was a mere subterfuge.

The Temperani case is also cited by counsel in their discussion of the question of search warrant in the case at bar. But it can have no relevancy on that point for the reason that in the Temperani case there was no search warrant.

(3) THE LIQUORS WERE PROPERLY RETAINED AND RECEIVED IN EVIDENCE ON ACCOUNT OF BLAKE BEING ALSO INFORMED AGAINST.

Moreover, it is clear that in any event it was proper to retain the liquors as against the defendant Blake and thus deny Forni's motion. And it was proper to receive the liquors in evidence at the trial, the defendant Blake being also on trial. For as we have seen, Blake was arrested at the time of the seizure; he was jointly charged with Forni in the same information and, having been arraigned, pleaded not guilty and was placed on trial at the same time with Forni and convicted of the same offense. Being charged with a misdemeanor, such course was allowable.

California Penal Code, Section 1043.

16 Corpus Juris 817, Criminal Law Section 2071, note 73 and cases cited.

It is not contended that any of the rights of Blake under the Fourth Amendment were invaded. He could not have availed himself of any invasion, if

any invasion there were, of the rights of defendant Forni under the Amendments in question.

Remus vs. U. S., 291 Fed. 501, 511;
Hale vs. Henkel, 201 U. S. 43, 50 L. Ed. 652;
Heywood vs. U. S., 268 Fed. 795, 803.

It thus results that regardless of any objection Forni might have had to the evidence it was proper for the court to retain the liquors and receive them in evidence as incriminating Blake, and the circumstance that they might have been inadmissible as to Forni, even if that were true, would not prevent their use in evidence.

Pappas vs. U. S., 292 Fed. 982;
Itow vs. U. S., 223 Fed. 25, 29.

It is held specifically in these cases, as well as other cases that might be cited, that the remedy of a defendant in such a situation as Forni claimed to be is not to require the evidence to be excluded, but to obtain an instruction from the court limiting its use. No such instruction was asked by Forni or refused. The cases cited are authority that in that case the point is not now available to the defendant Forni.

It is well settled that where evidence is admissible or admitted for a limited purpose, it is not error for the court to fail to so instruct in the absence of a request therefor.

Ball vs. U. S., 147 Fed. 32, 41.

II

THE COURT DID NOT ERR IN REGARD TO THE TESTIMONY OF RINCKEL AS TO THE ARRESTS OF FORNI.

One of the counts of the information upon which the defendants were on trial was for maintaining a common nuisance in that they kept for sale on the premises certain liquors. The case was thus one of the type wherein evidence of other similar offenses would be properly received as bearing on the question of intent.

Hazelton vs. U. S., 293 Fed. 384.

And from the statement made by the trial Judge in ruling it appears that he only had in mind this principle. For he said in ruling "the rule is well settled that where the charge is that of maintaining a nuisance involving the keeping for sale of intoxicating liquor, previous offenses are admissible." (Tr. p. 65.) In face of such a statement of the court, if the real point of the defendants' objection was as to proof of arrest rather than as to proof of a crime, he should have so indicated to the court.

Moreover, the record is not such as to show error. It appears that the witness Rinckel first testified, without any objection whatever, "I have arrested him *several* times". (Tr. p. 65.) The next question was "about how many times, Rinckel?" This was objected to on general grounds and being overruled the witness merely answered he arrested him "*four*

or five times". Thus as between the question and answer not objected to and the question and answer objected to the difference is infinitesimal. The subsequent question by the court (Tr. p. 70) was not objected to nor was any exception taken.

On another ground, however, the point would be held to be of no consequence. For it will be seen that the government presented only the single witness, the Agent Rinckel. He was the officer who made the affidavit for the search warrant and who also made the affidavit on behalf of the government in resisting their preliminary motions. He was wholly uncorroborated. Thus the case is within the rule recently announced by this court in the case of

> *Stubbs vs. U. S.,* No. 4236, Opinion filed Oct. 20, 1924.

It is there stated that since there was no corroboration of the testimony of the witness as to similar offenses, if the jury discredited her as to the matter in hand they would naturally discredit her as to the other offenses, and the ruling was therefore without prejudice.

The statement of the witness was of little importance in view of the other evidence in the case. It could in no substantial manner cause him any prejudice. It was probably deemed by the court merely preliminary and was not thereafter pursued. It would not afford ground for a reversal of the case in view of the provisions of Section 269 of the Judicial Code, as amended.

To the suggestion made on behalf of plaintiff in error in the discussion of different questions in the case that Rinckel should not have been allowed to declare the character of the liquor, it is answered that the said liquor was Scotch whiskey and intoxicating, and, if the testimony is to be taken at face value, the fact is manifestly proven, but in the absence of cross-examination, or any showing that he could not have known the fact, the court was authorized to take the testimony at face value.

Winkler vs. U. S., 297 Fed. 202, 204.

Moreover, the Agent Rinckel did qualify on the question by saying that he had been for four years a Prohibition Officer, he is described as a Prohibition Agent, and the court can take notice as to the character of the duties of such an officer. He also said that he could say from his experience as a Prohibition Officer and his experience with intoxicating liquor that all of this liquor contained over one-half of one per cent of alcohol by volume (Tr. p. 69) and that he was familiar with various kinds of intoxicating liquor. (Tr. p. 68.)

III

THERE WAS NO ERROR COMMITTED IN EXCLUDING FURTHER EVIDENCE BY THE WITNESS S. FORNI IN REGARD TO THE PREMISES BEING THE HOME OF THE DEFENDANT.

The matter complained of in this respect appears at page 72 of the Transcript. Apparently the court

was making a correct application of the rule that all questions as to the competency of the testimony in regard to the liquors was at that stage of the case closed, and that especially the defendant was not entitled to have the question of competency submitted to a jury. There can be no real contention to the contrary. But on the oral argument it seems to be claimed that the testimony might have been relevant upon the further point as to the intent involved in the first count of the information. In the first place it would have been the duty of counsel to so indicate to the court at the time when it appeared that the court had in mind a different question. But, even as to the latter assumption, defendant's contention is wholly unfounded, for the witness was permitted to say "I absolutely know these premises was his home". (Tr. p. 72.)

IV

THE ORAL CHARGE OF THE COURT WAS CORRECT; NO EXCEPTIONS WERE TAKEN THERETO.

The charge of the court given to the jury was entirely correct, although short, but no objections can now be urged to the charge since no exceptions were taken, nor were there any objections indicated. (Tr. p. 74.) It appears that at the conclusion of the charge the court asked, "Are there any objections to the instructions?" None were stated, defendant merely excepting to the refusal to give two instruc-

tions theretofore proposed by him. Objections to the charge given by the court are not now available.

Allis vs. U. S., 155 U. S. 117, 123, 39 L. Ed. 91, 93.

Nor did the court err in refusing to give the two instructions requested by the defendant appearing at page 75 of the Transcript.

In the first, the court was asked to state to the jury that it would be a complete defense to the charge to show that the premises were a private dwelling. In other words, that one may use a private dwelling with impunity for acts which in the case of any other building would render it a common nuisance. There is no such rule of law.

The second instruction undertook to define the term "private dwelling", but such definition would have no relevancy as to any matter before the jury. It would be relevant only in determining the competency of testimony which had theretofore been passed upon by the court and was wholly a question of law.

V

IF THERE HAD BEEN ANY ERROR COMMITTED IN THE CASE AS ARGUED BY PLAINTIFF IN ERROR, IN VIEW OF THE TESTIMONY IT WOULD HAVE BEEN WITHOUT PREJUDICE.

Even if the receipt of evidence of what Rinckel found upon the seizure of the liquors were incom-

petent it would still be without prejudice under Section 269 of the Judicial Code, as amended.

It will be noted that in advance of any search warrant or search Rinckel saw the Scotch whiskey through an open door. He also states that he saw the liquors in the shed from an adjoining lot. This testimony would have been indisputably competent and admissible. It was not acquired through any trespass; although if it had been so acquired it would not have been for that reason inadmissible.

Raine vs. U. S., 299 Fed. 407, 410;
Hester vs. U. S., 265 U. S. 57, 68 L. Ed.

But the contention that Rinckel committed a trespass in that respect is unfounded, for he evidently saw the Scotch whiskey through the open door of the garage from the street, and he saw the liquors in the shed from an adjoining lot, which would have been no trespass, at least upon Forni. This testimony was not denied. Rinckel further testified that Forni had admitted to him that he obtained the liquors "over the rail on the outside", thus admitting that they were smuggled. This latter testimony was independent of things found upon the search. If no other facts had been proven the jury could have done nothing else than find a verdict of guilty.

See the following cases construing Section 269 of the Judicial Code, as amended:

Horning v. District of Columbia, 254 U. S. 135, 65 L. Ed. 185, 187.

Winkle vs. U. S., 291 Fed. 493, 496.

Mercantile Trust Company v. Olsan, 292 Fed. 49, 51.

It thus appears that the defendant Forni was fairly tried; that no prejudicial error was committed by the court; that the testimony was so overwhelming that counsel did not even make a motion for a directed verdict, and that the officers, so far from being shown to have invaded defendant's rights, are to be commended for the breaking up of what was a quite elaborate illicit enterprise.

The sentence and judgment should be affirmed.

Respectfully submitted,

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